

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

FOX NEWS NETWORK, LLC,

*Plaintiff,*

v.

TVEYES INC.,

*Defendant.*

Case No. 13-CV-5315 (AKH)

**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO FILE  
BRIEF OF MEDIA CRITICS AS *AMICI CURIAE***

Brett Max Kaufman  
TECHNOLOGY LAW & POLICY CLINIC  
NEW YORK UNIVERSITY SCHOOL OF LAW  
245 Sullivan Street—Furman Hall #511  
New York, New York 10012  
T: 212.998.6042  
F: 212.995.4031  
brettmaxkaufman@nyu.edu

Corynne McSherry  
Kit Walsh  
ELECTRONIC FRONTIER FOUNDATION  
815 Eddy Street  
San Francisco, California 94109  
T: 415.436.9333 x122  
F: 415.436.9993  
corynne@eff.org

*Counsel for Amici Curiae*

Proposed *amici curiae* Eric Alterman, Brave New Films, Fairness and Accuracy in Reporting (“FAIR”), and Victor Navasky (collectively, the “Media Critics *Amici*”) respectfully move for leave to file the proposed brief of *amici curiae* attached as Exhibit 1 to the May 26, 2015 Declaration of Brett Max Kaufman (“Kaufman Declaration”), in support of defendant TVEyes Inc.’s supplemental motion for summary judgment. Defendant TVEyes Inc. consents to the filing of this brief; Plaintiff Fox News Network, LLC consents to the filing of the brief to the extent that it is narrowly tailored to the issues for which the Court has requested briefing.<sup>1</sup>

### INTERESTS OF MEDIA CRITICS *AMICI*

The proposed *amici* are media critics with decades of experience analyzing the news media and publishing commentary addressing issues of pivotal importance to democracy and society including law, money and politics, war and propaganda, freedom of speech, targeted killing, racial bias, police brutality, and economic inequality, among many others. Throughout their decades of work, *amici* have consistently relied on fair use. They have an interest in this case because of its potential impact on their ability to monitor and conduct research on the news media in a rapidly changing media landscape. The Media Critics *Amici* have personal and professional stakes in ensuring that the tools necessary to conduct meaningful analysis and commentary of the modern news media remains protected by fair use.

**Eric Alterman** is a Distinguished Professor of English and Journalism, Brooklyn College, City University of New York (“CUNY”), and a Professor of Journalism at the CUNY Graduate School of Journalism. He is also “The Liberal Media” columnist for *The Nation*, a senior fellow at the Center for American Progress in Washington, D.C., and at the Nation

---

<sup>1</sup> The Media Critics *Amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than Media Critics *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. Kaufman Decl. ¶ 3.

Institute and the World Policy Institute in New York. Alterman is a former columnist for *The Daily Beast*, *The Forward*, *Moment*, *Rolling Stone*, and *Mother Jones*. He is the author of ten books, including the national bestseller *What Liberal Media? The Truth About Bias and the News*. He won the George Orwell Award for Distinguished Contribution to Honesty and Clarity in Public Language for his first book, *Sound & Fury: The Making of the Punditocracy* (1992), and he won the Mirror Award for Best Commentary in Digital Media, given by Syracuse University's Newhouse School, in 2011.

**Brave New Films** is a media company established by filmmaker Robert Greenwald that produces progressive feature-length documentaries and investigative videos to educate, influence, and empower viewers to take action around prominent public-policy issues. Using cutting-edge Internet-video campaigns, Brave New Films informs the public, challenges mainstream narratives found in corporate media, and motivates people to take action on social issues nationwide. The organization recently launched Brave New Educators, which provides free films and educational resources to teachers and uses documentaries, blogs, and social media to start a dialogue with students and professors across college and high-school campuses.

**Fairness and Accuracy in Reporting ("FAIR")** is a national media-watch group that has been producing well-documented criticism of media bias and censorship since 1986. FAIR works to invigorate the First Amendment by advocating for greater diversity in the press and by scrutinizing media practices that marginalize public-interest, minority, and dissenting viewpoints. FAIR works to expose neglected news stories and to defend working journalists when they are muzzled. FAIR works with both activists and journalists, and it maintains a regular dialogue with reporters at news outlets across the country, providing constructive critiques and applauding exceptional, hard-hitting journalism. FAIR publishes *Extra!*, a monthly

newsletter featuring analysis of current media bias, censorship, and effects of media consolidation, and it produces the weekly radio program CounterSpin, which broadcasts nationally on more than 130 radio stations.

**Victor Navasky** has served as editor, publisher, and now publisher emeritus of *The Nation*, which he joined in 1978. He is also the George Delacorte Professor of Magazine Journalism at the Columbia University's Graduate School of Journalism, where he directs the Delacorte Center of Magazines and chairs the *Columbia Journalism Review*. Before joining *The Nation*, he served as an editor at *The New York Times Magazine* and wrote a monthly column about the publishing business for the *Times Book Review*. He has written several books and has been awarded the National Book Award, the George Polk Book Award, and the Ann M. Sperber Prize. Mr. Navasky is a member of the American Academy of Arts and Sciences.

### ARGUMENT

A district court has broad discretion to allow the filing of an *amicus* brief when it “will aid in the determination of the motion[] at issue.” *James Square Nursing Home, Inc. v. Wing*, 897 F. Supp. 682, 683 n.2 (N.D.N.Y. 1995); *see Jam. Hosp. Med. Ctr. v. United Health Grp., Inc.*, 584 F. Supp. 2d 489, 497 (E.D.N.Y. 2008) *United States v. Yonkers Contracting Co.*, 697 F. Supp. 779, 781 (S.D.N.Y. 1988). Courts permit *amicus* filings when they will “offer insights not available from the parties” or provide “unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.” *Auto. Club of N.Y., Inc. v. Port Auth. of N.Y. & N.J.*, No. 11 Civ. 6746, 2011 WL 5865296 (S.D.N.Y. Nov. 22, 2011) (quotation marks omitted); *see also United States v. El-Gabrowni*, 844 F. Supp. 955, 957 n.1 (S.D.N.Y. 1994).

The Media Critics *Amici* meet this standard. As regular contributors to public discourse through research, writing, and other artistic creation in the field of media criticism, *amici* can

offer a perspective on the issues pending before the Court that is unique and unrepresented by the parties to this litigation. Specifically, this case presents broad implications for the distribution of media commentary, research, analysis, and scholarship such as that produced by the Media Critics *Amici*. See, e.g., *Neonatology Assocs., P.A. v. C.I.R.*, 293 F.3d 128, 132 (3d Cir. 2002) (explaining that *amici* can “argue points deemed too far-reaching for emphasis by a party intent on winning a particular case” and can help “explain the impact a potential holding might have on an industry or other group”). The Media Critics *Amici* have personal and professional stakes in ensuring that the technological tools for the creation of media criticism remain protected by fair use, and their unique insights will aid the Court in resolving the issues presented by the pending supplemental motions for summary judgment.

### CONCLUSION

For these reasons, Media Critics *Amici* respectfully request that this Court grant their motion for leave to file the brief of *amici curiae* attached as Exhibit 1 to the Kaufman Declaration.

Date: May 28, 2015

Corynne McSherry  
Kit Walsh  
ELECTRONIC FRONTIER FOUNDATION  
815 Eddy Street  
San Francisco, California 94109  
T: 415.436.9333 x122  
F: 415.436.9993  
corynne@eff.org

Respectfully submitted,

/s/ Brett Max Kaufman  
Brett Max Kaufman  
TECHNOLOGY LAW & POLICY CLINIC  
N.Y.U. SCHOOL OF LAW  
245 Sullivan Street—Furman Hall #511  
New York, New York 10012  
T: 212.998.6042  
F: 212.995.4031  
brettmaxkaufman@nyu.edu

*Counsel for Proposed Amici Curiae*